## INDEX


| | PAGE |
|---|---|
| Question Presented | 1 |
| Questions Not Presented | 2 |
| Statement | 3 |
| Reasons for Denying the Writ | 9 |
| Conclusion | 17 |


## CITATIONS

*Cases:*


*Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957) — 13

*Atalanta Trading Corp.* v. *FTC*, 258 F.2d 365 (2d Cir.1958) — 14, 15

*Automatic Canteen Co.* v. *FTC*, 346 U.S. 61 (1953) — 14, 15

*Borden's Farm Products Co.* v. *Ten Eyck*, 11 F.Supp. 599 (S.D.N.Y. 1935), *aff'd*, 297 U.S. 251 (1936) — 10

*Callaway Mills Co.*, CCH Trade Reg. Rep. Transfer Binder 1963-1965 ¶16800 (FTC, Feb. 10, 1964) — 3-4, 10, 12-13

*Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936), *rev'd*, 101 F.2d 620 (6th Cir.), *cert. denied*, 308 U.S. 557 (1939) — 14

*Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962) — 14

*Standard Oil Co.*, 49 F.T.C. 923 (1953) — 13

PAGE

*Statutes:*

Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13

Sec. 2(a), 15 U.S.C. § 13(a) ..... 2, 3, 13

Sec. 2(b), 15 U.S.C. § 13(b) ..... 3, 13

*Miscellaneous:*

Consumer Brand Preferences and "Like Grade and Quality" Under Robinson-Patman Act, 65 Col. L. Rev. 720 (1965) ..... 13

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 1127

FEDERAL TRADE COMMISSION, *Petitioner,*

*v.*

THE BORDEN COMPANY, *Respondent.*

## BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is respectfully submitted on behalf of the Respondent The Borden Company, in opposition to the petition of the Federal Trade Commission for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on December 4, 1964.

### Question Presented

The Respondent manufactured and sold two evaporated milk products: (1) a premium product which consistently commanded a higher price at all levels of distribution, and (2) a chemically identical but com-

mercially less acceptable product which the Respondent (like all other producers and handlers thereof) had to sell at lower prices if the product was to be sold at all.

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act prohibits price discrimination only in respect of "commodities of like grade and quality."

The question presented is whether on the record before it the Court of Appeals correctly held that the premium product was not of like grade and quality with the commercially different, non-premium product, and that therefore the Respondent's selling of the non-premium product for lower prices than those received for the premium product did not violate Section 2(a) of the Robinson-Patman Act.

**Questions Not Presented**

The case does not, as stated at page 2 of the petition, present any question whether a mere change in labels can change the grade and quality of a product. The Court of Appeals emphatically rejected any notion that any such "artificial distinction" could be of any legal significance (Pet. App. A, pp. 27-28)*; and the court put its decision squarely on the ground that in this case it has been thoroughly demonstrated that the difference was a very real one, in that the premium product in fact commanded a consistently higher price at all levels of distribution—wholesaler, retailer and consumer—than did the non-premium product.

* "Pet. App. A" means the petition's Appendix A, which is a copy of the Court of Appeals' opinion.

Nor does this case, as urged at pages 8-9 and 16 of the petition, present any question of favoritism to "large buyers" or "chain stores". Quite the contrary, what the record shows (see pages 6-7 below) is that independents as well as chains purchased the non-premium product; that chains as well as independents purchased the premium product; that many independents as well as many chains handled both products; and that the Respondent "made no distinction between large and small accounts." (R. 33).

In fact, this is merely another in a long line of Robinson-Patman cases in which it has uniformly been held that a premium product not only may, but must, be sold at the higher price normally commanded by it in the marketplace; and that the premium differential, established by and customarily existing in the market, is to be taken into account regardless of whether the premium and the non-premium products are physically the same. The Court of Appeals, here, applied precisely the same test for purposes of Section 2(a) of the Robinson-Patman Act as had previously been applied, by the Commission and by the courts, for purposes of Section 2(b) of the same statute.

## Statement

**Premium and non-premium products, under the Robinson-Patman Act.** In the terminology customarily employed by the Commission under the Robinson-Patman Act, a sharp distinction is drawn between "premium" products on the one hand and "non-premium" products on the other. As most recently defined by the Commission, in *Callaway Mills*

*Co.*, CCH Trade Reg. Rep. Transfer Binder 1963-1965 ¶16800 (FTC, Feb. 10, 1964, at p. 21,755), a premium product is one which "normally commands a price higher than that usually received by sellers of competitive goods." The premium product may command the higher price because of "intense public demand" and "saleability". Or it may command the higher price because of "intrinsic superior quality". In either event, whether the reason is its grade or its quality, the fact that the product normally commands a higher price makes it a premium product.

**Premium and non-premium products, in the evaporated milk business.** This sharp distinction between premium and non-premium products has prevailed for many years in the evaporated milk business. There have been three premium products: Carnation, Pet and the Respondent's Borden brand, which has been on the market for over 70 years. At all levels of distribution, these brands have sold at substantially higher prices than the non-premium brands, consisting in the main of evaporated milk put up by more than 25 different packers under the private labels of the purchasers (Pet. App. A, pp. 23-24, 27; R. 78, 879-84).

Throughout the market, the wholesalers and the retailers have paid more for the premium brands; and likewise they have resold the premium brands for more (and with less selling effort), than the private brands (Pet. App. A, pp. 23-24, 27; R. 431-34, 478-81).

As one of the Commission's wholesaler witnesses put it:

> "Private label merchandise is no good for nobody unless there is a price on it. . . . In the retail

> trade as a whole they haven't been too much interested in [private label evaporated milk] . . . frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. . . . It has got to have $1.50 or $2 a case spread to make it interesting." (Pet. App. A, p. 24; R. 330-332)

And as the Hearing Examiner pointed out in that connection, "Respondent was not offering its private-label milk for that much less than its Borden brand milk." (R. 54).

**Reasons why Borden brand evaporated milk is a premium product.** The reasons why the Respondent's Borden brand milk commanded that higher price are abundantly clear in the record. Consumers had confidence in the Borden brand name and in the Company behind it—a confidence grounded in factors such as long and favorable experience with the Borden product, unfavorable experiences with private labels, physicians' recommendations as to the best brand for infant feeding, and the Respondent's advertising and promotional efforts (Pet. App. A, p. 23; R. 24-25, 230, 246-47).

Consumers' favorable experience with the Borden brand product, in contrast to unfavorable experiences with private labels, was no accident. It was the result of the Respondent's continuing concern for the Borden brand product, from the day it was packed to the day it was put in the hands of the consumer, all to the end that no consumer should ever get any stale or otherwise deteriorated Borden brand milk. First packed, first shipped was the rule, even though that often involved costly shipping from far-away plants or storage warehouses;

and the Respondent had more than 200 representatives out in the field, going into the retail stores and checking the freshness of the shelf and storeroom stocks of the Borden brand product (R. 60-61, 493-94, 510-11, 544).

With respect to the private label, on the other hand, the Respondent simply packed the product as and when instructed by the customer and held it at the packing plant subject to the customer's delivery instructions; and the Respondent did nothing more, and it took no responsibility whatsoever, after the product left the factory door. The private label product was sold f.o.b. plant, with only the purchaser's label on it; the Respondent's name nowhere appeared on it; and any use of the Respondent's name in connection with that product was prohibited (R. 61-62, 519-22).

**Independents as well as chains handled both the non-premium product and the premium product.** The Respondent, manufacturing and selling both the premium (Borden) brand and the non-premium (private label) product "made no distinction between large and small accounts" and no purchaser was "for any reason, denied the right to buy private-label evaporated milk from the Respondent." (R. 33, 54).

The handlers of the private label included not only some chain retailers (R. 813-15) but also an even larger number of wholesale grocery concerns (R. 809-12) and cooperative buying associations of retailers (R. 815). And everyone who purchased at the same plant in any given month paid the same price, regardless of who he was, how big he was, or how much he bought (R. 79).

So, too, with the handlers of the Borden brand, which was sold on a uniform delivered price basis

throughout the country (R. 19) to all kinds of customers including retail chains (R. 820-22) as well as wholesalers (R. 815-18) and cooperative buying associations of retailers (R. 819-20).

Many purchasers, including chains as well as independents, bought both the Borden brand product and the private label product. With the private label freely available to them at the lower prices, the group of purchasers of private label from the Respondent nevertheless kept right on buying the Borden brand, at the higher prices, in substantially undiminished quantities (Pet. App. A, p. 24; R. 943). They did not substitute the lower priced private label product for the higher priced premium product. They regarded private label and Borden brand as two different products, each with its own price level and its own competitive situation.

**The absence of competitive injury.** As previously noted, the wholesalers and retailers had to pay more for Borden brand, but they could resell it for more. They bought private label for less, but they also had to resell it for less.

Turning to the producer or "primary" line of competition, the evidence showed some shifting of private label business to the Respondent at plants where it had the geographic and freight advantage, and some shifting of such business away from the Respondent in instances where competitors' plants were more advantageously located. The over-all result was that during the complaint period the testifying competitors, far from losing out, actually increased their market share,

sold larger amounts of private label than before, and sold it at higher prices (R. 31-57, 753-67).

The Hearing Examiner made a detailed analysis of the evidence, after a trial extending over almost three years, and ordered the complaint dismissed on the ground that there was no competitive injury (R. 57).

The absence of any basis for the contrary findings at the Commission level—findings made by only two of the five Commissioners, with one Commissioner dissenting and two not participating—was thoroughly briefed before the Court of Appeals, which found it unnecessary to decide the issue in view of its decision on the threshold issue of like grade and quality. The Court nevertheless observed, at the close of its opinion, that the Respondent's arguments as to the absence of competitive injury "seem to have considerable merit" (Pet. App. A, p. 30).

**The cost-justification of the challenged price differences.** The Hearing Examiner also ordered the complaint dismissed on the separate and independent ground that the Respondent (whose costs had been analyzed in meticulous detail by independent public accountants) had sustained its burden of proving that the challenged price differences were cost-justified (R. 74).

Here again, the absence of any warrant for the contrary conclusion at the Commission level was briefed in detail before the Court of Appeals. Again, as on the injury issue, a decision by the Court of Appeals proved unnecessary; but as to the cost justification issue, too,

the court commented that the Respondent's arguments "seem to have considerable merit" (Pet. App. A, p. 30).

**Reasons for Denying the Writ**

1. **The Court of Appeals' decision was clearly correct.** The opinion of the Court of Appeals, holding that the Respondent's premium product and its non-premium product were not of like grade and quality, evidences a most thoughtful attention to the considerations urged upon the court by the Commission as well as by the Respondent; and the court's detailed exposition of the reasons for its holding need not be repeated here.

What it comes down to, quite simply, is that the court recognized that trade and commerce, not chemistry, is the province of the Robinson-Patman Act, and that the prices at which people actually buy and sell goods are at the very heart of trade and commerce. Once those facts are recognized, it inexorably follows that a product which customarily commands a price of well over $6.00 per case is a quite different product from one which everybody has to sell for around $5.00 or less in order to sell it at all (Pet. App. A, pp. 23-24, R. 19-20, 26-30, 78). And as the Commission concedes, at page 9 of the petition, "Congress explicitly did not prohibit a seller from charging less for a different product."

The Commission, contending that commercially different products are nevertheless the same for purposes of this trade regulation statute, simply asserts that the "grade and quality" of commodities refers to their

physical properties and not to the prices that they command in the marketplace—and says that this is "a matter of simple English usage."

That was not the "simple English" of it to Judge Learned Hand. In a decision under another trade regulation statute, handed down at the very time when the Robinson-Patman amendment was pending before the Congress, Judge Hand emphasized the significance of consumer preferences grounded in considerations other than physical differences, as follows:

> "Commercially the [advertised] brands had come to mean a better grade of milk, for the hygienic properties of a product do not fix its commercial quality, but the opinion in which buyers hold it." *Borden's Farm Products Co.* v. *Ten Eyck,* 11 F. Supp. 599, 600 (S.D.N.Y. 1935), *aff'd,* 297 U.S. 251 (1936)

Moreover, as recently as 1964, the Commission's own view as to the "simple English" reading of "grade and quality" was radically different from its presently asserted position. In *Callaway Mills* (pages 3-4 above) the Commission categorically held that in order to establish "grade and quality" proof must be adduced not only as to "intrinsic quality" but also as to "saleability"—thus assigning to the term "grade" the public demand or saleability characteristics of a product, and to the term "quality" the intrinsic or physical characteristics of a product.

In short, the "simple English" of it is that the statute, in so many words, calls for likeness in two respects: "grade *and* quality"—likeness in the marketplace as well as likeness in physical composition. Since

the proof established beyond a shadow of a doubt that Borden brand and private label were radically unlike in the marketplace, the first of the two statutory criteria was not met and the two products were not of like grade and quality within the meaning of the statute.

Equally without merit are the Commission's references to legislative history. The Patman remarks quoted at pages 9-10 of the petition were obviously of an off-hand nature ("I have not time to discuss that feature"); they referred only to "same quality"; and they made no reference to "grade". The more formal and definitive statement on the subject, made by the man whose authorship of the Patman bill was expressly confirmed by Congressman Patman, is the one set out at pages 10-11 of the petition. That statement expressly sanctioned the very kind of premium brand-private label operation which is involved in this present case. The Respondent sold its standard Borden brand evaporated milk at the prices commanded by that product, just as the legislators in the quoted statement contemplated a manufacturer would continue to do. The Respondent also packed evaporated milk under the private labels of the purchasers, just as the legislators there said it would be free to do. And the equality of treatment among private label purchasers, which the legislators wished to assure, was established in exactly the way the legislators said it should be; viz., the Respondent stood ready to pack that product for all, on the same terms (Pet. App. A, p. 21; R. 33, 54).

Likewise without basis is the Commission's claim that the Court of Appeals' decision is a departure from the Commission's "well-settled administrative inter-

pretation." The simple fact, as the Court of Appeals pointed out, is that in none of the Commission's previous cases had there been "any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not." (Pet. App. A, p. 27). In the earlier cases, a premium product was a mere theoretical possibility, involving (as the Commission puts it at page 12 of the petition) goods which "might" be sold at different prices. Here, in total contrast, the premium character of the Borden brand and the non-premium character of the private label is no mere theoretical possibility; it is a thoroughly proved actuality.

2. **The Court of Appeals used precisely the same product comparison test as has uniformly been used by the Commission and by the courts under the Robinson-Patman Act.** There is nothing at all new about taking into account, for product comparison purposes under the Robinson-Patman Act, the prices at which the products customarily sell in the marketplace as well as the physical characteristics thereof. Both the Commission and the courts have been doing that, time and again, for many years. The court below cited a number of examples, including the Commission's own most recent *Callaway Mills* decision, handed down in 1964 (Pet. App. A, p. 29).

In that case the Commission categorically held that in order to prove "grade and quality" attention must be given not only to the "intrinsic superior quality" of one product over another, but also to the "intense public demand" that may exist for one product as com-

pared with another (CCH Trade Reg. Rep. Transfer Binder 1963-1965, at p. 21,755).

And as the Commission had stated some years earlier in *Anheuser-Busch, Inc.*, 54 F.T.C. 277, 302 (1957):

> "The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price in a normal market."

Similarly in *Standard Oil Co.*, 49 F.T.C. 923, 952 (1953) the Commission stated that:

> ". . . in the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor."

The foregoing rulings were made for purposes of Section 2(b) of the Robinson-Patman Act. In the present case the issue arises under Section 2(a) of that same trade regulation statute. The Court of Appeals in the present case applied precisely the same product comparison test as had been applied in all of the earlier Robinson-Patman cases.

This, on the face of it, would hardly seem to give rise to any problem calling for consideration by this Court.*

---

* The Commission, in the absence of any legal authority for its position, quotes (p. 16) an advertising magazine's characterization of the decision below. For a professional discussion of the matter see Consumer Brand Preferences and "Like Grade and Quality" under Robinson-Patman Act, 65 Col. L. Rev. 720 (1965), which concludes at page 725 with the statement that ". . . once such a consumer preference has been demonstrated, the Commission and the courts should acknowledge that physical comparison is not the only basis for selection in the market place, and conclude that the similar products sold under premium and private labels are not of like grade and quality."

3. **The Court of Appeals' decision is in full accord with the decisions of this Court and of all the Courts of Appeal; there is no conflict.** The Commission asserts no conflict, and there is none.

Indeed, the principal judicial authority relied upon by the Commission, before the Fifth Circuit, was a decision of that same Court of Appeals; and the inapplicability of the earlier case, *Hartley & Parker, Inc.* v. *Florida Beverage Corp.,* 307 F. 2d 916 (5th Cir. 1962) was specifically pointed out in the court's opinion in the present case (Pet. App. A, p. 26).* In *Hartley & Parker,* in total contrast to the present case, the two products were not only physically alike but were being marketed and represented as the same product. Thus the two *Hartley & Parker* products were in fact like goods, commercially as well as physically. The *Hartley & Parker* situation was the same as in the old *Goodyear* case, where the private label handler, Sears, was in fact trading on the Goodyear brand name and thus rendering the two products alike, commercially as well as physically.**

The Fifth Circuit's decision in the present case, far from being in conflict with any other court, is affirmatively in accord with the highly relevant decisions of the Second Circuit in *Atalanta Trading Corp.* v. *FTC,* 258 F. 2d 365 (2d Cir. 1958), and of this Court in *Automatic Canteen Co.* v. *FTC,* 346 U.S. 61 (1953).

---

* Judge Rives, who wrote the opinion in *Hartley & Parker,* was also a member of the panel which heard the present case, and he joined in the unanimous decision below.

** *Goodyear Tire & Rubber Co.,* 22 F.T.C. 232, 295, 297 (1936); Brief of Counsel Supporting the Complaint in Opposition to Respondent's Motion to Dismiss, pp. 2-6; Order dated June 26, 1934.

In *Atalanta* (as the Fifth Circuit noted in the present case, Pet. App. A, p. 28, n. 8) one of the reasons for the Second Circuit's rejection of the Commission's ruling on like grade and quality was that the Commission had erroneously failed to take into account the prices at which the products were sold—precisely the error that the Commission made in the present case.

In *Automatic Canteen,* this Court emphasized at pages 63 and 74 that the Robinson-Patman Act should be interpreted and applied consistently with "the broader antitrust policies that have been laid down by Congress" and so as to avoid a "price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." The court below, after quoting those statements, went on to note that "Were we to ignore the fact that a brand name product may be able to command a higher price than an unknown brand because of its public acceptance, then we would be encouraging just such a price uniformity and rigidity, in conflict with the realities of the marketplace and Congressional antitrust policies." (Pet. App. A, p. 25).

The Commission stands silent with respect to *Atalanta* and *Automatic Canteen,* and fails even to mention either of those highly significant cases.

4. **The petition seeks to raise hypothetical questions, not presented by or ripe for decision on this record.** The Commission, unable to raise any substantial question about the soundness of what was actually decided by the court below, has in the main directed its petition to the purely hypothetical questions noted at pages 2-3 above.

The time, if ever, when a lower court holds that a mere change in labels can change the grade and quality of a product will be the appropriate occasion, we respectfully submit, for this Court to address itself to that proposition. In the present case, as noted at page 2 above, the proposition has already been categorically rejected by the Court of Appeals.

So, too, with the alleged problems of favoritism to large buyers and chain stores. As shown at pages 6-7 above, no such problems are presented on this record. Purchasers of all classes, small and large, independent and chain, bought both products, and all were treated alike. The time, if ever, when another *Goodyear* situation arises, with a single large purchaser of private label buying at a lower price but in fact trading on and getting the benefit of the brand name, will be the appropriate occasion for this Court to consider alleged "large purchaser" and "chain store" problems. On the present record, consideration of such matters would be entirely hypothetical.

## Conclusion

The decision below is clearly correct; it is in full accord with previous decisions of the Commission, of the lower courts and of this Court; and the issues sought to be presented by the petition are hypothetical.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

JOHN E. F. WOOD
KENT V. LUKINGBEAL
ROBERT C. JOHNSTON
40 Wall Street
New York, New York

CECIL I. CROUSE
PHILIP S. CAMPBELL
350 Madison Avenue
New York, New York

*Attorneys for Respondent*

*Of Counsel:*

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
40 Wall Street
New York, New York

C. BRIEN DILLON
MOULTON GOODRUM, JR.
BAKER, BOTTS, SHEPHERD & COATES
Esperson Building
Houston, Texas